IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA

IN RE:	
JOHN J. CARNEY Debtor	(Bankruptcy No. 98-19609DWS/JKF (Chapter 7
LINDA CARACAPPA Movant v. THOMAS P. CARNEY, INC. Respondent	(Re: Objections to claims
**********	
LINDA CARACAPPA Movant v. THOMAS P. CARNEY and TERESA CARNEY Respondents	

Appearances:
William Goldstein, Esquire, Counsel to Linda Caracappa

Michael P. Kelly, Esquire, Counsel to Debtor, John J. Carney

John T. Carroll, III, Esquire, Counsel to Trustee

John R. Crayton, Esquire, Counsel to Thomas P. Carney, Inc. and Thomas and Teresa Carney

MEMORANDUM OPINION[1]

Before us is a Motion for Summary Judgment[2] filed by Linda Caracappa, who had previously filed Objections[3] to two Proofs of Claim. The Trustee has joined in Ms. Caracappa's Motion for

[1]The court's jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact and conclusions of law.

[2]Docket No. 115.

[3]Docket Nos. 86 and 88.

Summary Judgment.[4] Claim No. 2 was filed by Thomas P. Carney, Inc. (TPC), as a secured claim for $580,000 and an unsecured claim for $963,645.53. Attached to the Proof of Claim is a mortgage in the principal amount of $290,000 dated September 30, 1995, granted by TPC to Debtor and his brother, Robert, secured by a property in Bear Creek Township, Pennsylvania. No promissory note is attached. Also attached is a North Carolina Deed of Trust dated September 30, 1995, for a condominium unit in Kill Devil Hills, North Carolina. The Deed of Trust states that the grantors (Debtor and his brother, Robert) are indebted to TPC pursuant to a promissory demand note (which is not attached) also purportedly dated September 30, 1995, for that debt. Both the mortgage and the Deed of Trust were notarized in New Jersey and both identify Michael T. Hartsough, an attorney in New Jersey, as the preparer. The Deed of Trust further indicates that the condominium was conveyed "to Mortgagor" in 1989. However, no "Mortgagor" is identified. No documentation is attached to support the unsecured portion of the claim.

Claim No. 4 was filed by Thomas and Teresa Carney as an unsecured claim for $526,514.50 for loans of unspecified amounts made on "1/10/89, 5/3/94, 8/20/95, and 7/30/98." Inasmuch as this bankruptcy was filed on July 30, 1998, the portion of the claim related to a loan purportedly made on July

[4]Docket No. 117.

30, 1998, may be a postpetition transaction. No documents are attached to support the proof of claim.

Ms. Caracappa is also a claimant against the estate. She filed Claim No. 11, for $1,170,044.19, based on a court order dated February 24, 1998, (which awarded her $1,018,941.94 as equitable distribution) plus accrued interest. Ms. Caracappa also listed $4,399.58 as a claim secured in bank accounts and identified a priority claim for $750 per week child support under 11 U.S.C. §507(a)(7).

In her Objections ... to Proof of Claim of Thomas P. Carney, Inc. (No.2) and/or Motion to Strike Proof of Claim,[5] Ms. Caracappa objects to the secured portion of TPC's Claim for the following reasons, inter alia: lack of sufficient credible evidence to support a loan in any amount, i.e., that the transaction is a sham and Debtor and Robert can manipulate the books (¶ 5c) and that TPC gave Debtor funds as a distribution on stock or as gifts or compensation and not as a loan (¶ 5h); lack of sufficient evidence to support a claim for $580,000 as opposed to one for $290,000 or half of any proven amount (¶¶ 5a and 5b); bar of the claim by the applicable statute of limitations (¶ 5d); failure to comply with Bankruptcy Rule 3001(c)) (¶¶ 3b,4); and bar based on principles of collateral estoppel to relitigation of issues decided by a specific equitable distribution order entered by a state court trial

[5]Docket No. 88.

judge (¶ 5f).

In the same pleading, Ms. Caracappa objects to the unsecured portion of TPC's Claim for the following reasons, inter alia: lack of sufficient credible evidence to support a loan for $963,645.53 (¶ 3a, ¶ 4); any amounts proffered as loans to shareholders were compensation (¶ 6i); bar of the claim by the applicable statute of limitations (¶ 6a); voidability as a preference (¶ 6k).

In her Objections ... to Proof of Claim of Thomas P. Carney and Theresa [sic] Carney (No.4) and/or Motion to Strike Proof of Claim,[6] Ms. Caracappa objects to this unsecured claim for $526,514.50 filed by Debtor's parents for the following reasons, inter alia: lack of sufficient evidence that the parents provided any loan or gave Debtor money subject to repayment (¶ 5b); failure to attach documents to support the claim as required by Bankruptcy Rule 3001(c)) (¶ 3, ¶ 4); collateral estoppel (¶ 5a); bar of statute of limitations (¶ 5e); voidability as a preference (¶ 5f); the debt was unmatured on the date of the bankruptcy filing (¶ 5g).

The summary judgment motion presently before us addresses only issue preclusion, that is, collateral estoppel, arising from state court proceedings in divorce related matters.

We begin with the relevant facts and procedure. This is a chapter 7 filed by a wealthy debtor whose primary creditor is

[6]Docket No. 86.

his former wife, Linda Caracappa, based upon an equitable distribution award to her in excess of one million dollars. The other large claims against the Debtor are all those of insiders -- Debtor's parents (Thomas and Teresa Carney) and TPC, a corporation in which Debtor is one of three brothers who own its stock. Debtor and his brother Robert hold an equal number of shares. Another of Debtor's brothers, Michael, has a minimal interest in the corporation.

Debtor's interest in assets is quite complex and was detailed at length in the February 24, 1998, equitable distribution opinion of Judge Sokolove. See Appendix to Motion for Summary Judgment, Docket No. 115 (hereinafter "Appendix"). Many of Debtor's assets are owned jointly with his brother Robert and, purportedly, were acquired with funds provided, in part, by distributions from TPC or from their parents. It is the nature of the distributions which is contested in the instant proceeding. TPC and the parents claim that those distributions were loans. Linda Caracappa contends that, to the extent any distributions occurred, they were not loans. Relying on findings by Judge Sokolove that there was insufficient evidence of any loans, Ms. Caracappa argues that TPC and Debtor's parents had the opportunity to prove that the transactions were loans during the equitable distribution trial and should be precluded from another opportunity here, on issue preclusion grounds.

For purposes of articulating the issue, we will utilize

the facts as determined by Judge Sokolove. See Appendix Exhibit 2, February 24, 1998, Opinion, Decree and Order of Bucks County Common Pleas Court Senior Judge Sokolove deciding equitable distribution issues (hereinafter "the Equitable Distribution Opinion and Order". See also id. at Exhibit 3, Praecipe for Judgment identifying date of Judge Sokolove's Equitable Distribution Opinion and Order as February 24, 1998.[7] Debtor John J. Carney began working in his parents' business, Thomas P. Carney, Inc., in 1972. In 1977, shortly before Debtor and Ms. Caracappa were married, Debtor's parents, Thomas and Teresa Carney, transferred ten shares of stock in TPC to Debtor and ten shares to Debtor's brother, Robert. In 1983, shortly before Robert's marriage, Thomas and Teresa Carney transferred their remaining shares in TPC to Debtor, Debtor's brother Robert, and Debtor's brother Michael.[8] Debtor then owned 49.3 percent of TPC.[9]

Debtor and his brother Robert, in December of 1991 and January of 1992, two months before the divorce action between Debtor and Ms. Caracappa was filed, attempted to transfer 72 of their combined 148 shares of TPC stock to their five minor children, collectively retaining 76 shares. Judge Sokolove did

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[7]Exhibit 2 is not dated. The praecipe for Judgment, Exhibit 3, is dated May 12, 1998, and reflects the date of the Equitable Distribution Opinion and Order as February 24, 1998.

[8]Appendix Exhibit 2, Equitable Distribution Opinion and Order at 4-5.

[9]See id. at 7.

not credit the alleged transfer, noting that no gift tax returns were produced and, despite the fact that Debtor alluded to a trust document, he never produced one.[10]

The Equitable Distribution Opinion and Order of February 24, 1998, made specific findings of fact and conclusions of law regarding the assets and liabilities of Debtor and Ms. Caracappa which findings and conclusions addressed issues of purported loans to Debtor from both TPC and Thomas and Teresa Carney. The Debtor was ordered to pay Ms. Caracappa $1,018,941.94 as equitable distribution. In a July 7, 1998, order, Judge Sokolove found Debtor in contempt of the February 24, 1998, equitable distribution order and a nearly two-year old child support order dated April 16, 1996.[11] Judge Sokolove set a hearing for July 28, 1998, to determine if Debtor had, by then, complied and purged the contempt. The July 28 hearing was continued to July 30, 1998. Debtor and Debtor's counsel appeared before Judge Sokolove at the contempt compliance hearing on July 30, 1998, and produced a check in the full amount of the support arrearages. Regarding compliance with the equitable distribution order, however, counsel informed Judge Sokolove that John Carney had filed a Chapter 7 petition. Debtor had filed bankruptcy that very day, although some

[10]Appendix Exhibit 2 at 6-7.

[11]Appendix Exhibit 5, Order of Judge Sokolove dated July 7, 1998.

schedules were filed later.[12] Cross-appeals were taken from Judge Sokolove's order of July 7, 1998, to the Pennsylvania Superior Court. On August 24, 1998, the Pennsylvania Superior Court acted upon the appeals thus:

> "[I]n view of the fact that these matters are before the Bankruptcy Court and have been granted an automatic stay pursuant to section 362(a) of the Bankruptcy Code..., the above-captioned appeals are hereby **DISMISSED** without prejudice to file a petition for reinstatement of the appeals in the event such is necessary following the conclusion of bankruptcy proceedings."[13]

Regarding the proofs of claims at issue -- the secured claim of TPC, the unsecured claim of TPC, and the unsecured claim of Thomas and Teresa Carney -- we are asked to examine the doctrine of issue preclusion. That is, whether or not the findings and conclusions of Judge Sokolove are sufficient to bar TPC and Debtor's parents from pursuing their claims in this case. Before collateral estoppel can be successfully invoked, four elements need be shown. Greenleaf v. Garlock, 174 F.3d 352 (3d Cir. 1999). Under Pennsylvania law, issue preclusion applies where:

(1) the issue decided in the prior adjudication was identical with the one presented in the later action;

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[12]See Exhibit C to Motion for Relief from Stay of Linda Caracappa Carney, Creditor ..., Docket No. 5, Transcript of Hearing before Judge Sokolove, July 30, 1998, at 2, 6.

[13]Appendix Exhibit 4.

(2) there was a final judgment on the merits;[14]
(3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and
(4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

Id. at 357-58. Accord, Witkowski v. Welch, 173 F.3d 192, 198-99 (3d Cir. 1999).

We look at the issues for each of the two sets of Carney claimants. The issue related to the objection to the claims of TPC and the Carneys is: does the Bucks County Equitable Distribution Opinion and Order satisfy the four elements so as to bar the claims and permit a bankruptcy court to preclude further evidence on the issue of loans from TPC and Debtor's parents to Debtor? We are persuaded that issue preclusion does not bar claimants from attempting to prove their claims in this case.

Identity of Issues

Although Judge Sokolove was required by Pennsylvania law

[14]Greenleaf says that "final judgment" for issue preclusion purposes may be somewhat different from what it is for res judicata purposes. For issue preclusion purposes, "'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded preclusive effect." 174 F.3d at 358, quoting Restatement (Second) of Judgments §13, as provided in Shaffer v. Smith, 673 A.2d 872, 875 (Pa. 1996). Greenleaf also refers to comments to § 13 which "emphasize that issue preclusion is applicable when it is determined 'that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming the basis for a judgment already entered.'" Greenleaf, 174 F.3d at 358. That is, the judgment doesn't have to be final in the sense of being appealable. Id. at 360.

to consider the assets and liabilities of both spouses in fashioning an equitable distribution award and, in so doing, heard evidence proffered by the spouses, the issue he adjudicated was an allocation of marital property, i.e., adjustment of the economic relationship of the spouses, and not whether, in fact, Debtor owes TPC or his parents as the result of the alleged distributions that form the basis of their proofs of claim. Thus, the issues are not identical in the two actions.

Finality of Judgment

Clearly, Judge Sokolove found insufficient evidence of Debtor's liability to adjust downward Debtor's assets available for equitable distribution. However, neither TPC nor Debtor's parents were parties to the proceedings in state court. Thus, even if Judge Sokolove's order is final for purposes of equitable distribution, as to TPC and Debtor's parents the state court could not enter a final judgment on the merits of their claims because they had no claims to make as part of the equitable distribution case.

Opportunity to Litigate

Moreover, although a corporate representative and a parent offered testimony in the equitable distribution proceedings, they were not parties. Even if they were provided a full and fair opportunity to produce evidence of what Debtor owed them in the context of that case, they produced what the parties asked. They had no opportunity to introduce evidence on their

own behalf. Their interest in the outcome of the equitable distribution matter was tenuous at best. Regardless of whether Judge Sokolove disregarded their claims in fashioning what Debtor owed to Ms. Caracappa, he did not and could not disallow their claims.

Privity

The standards for determining privity for issue preclusion are found in Moldovan v. the Great Atlantic & Pacific Tea Company, Inc., 790 F.2d 894 (3d Cir. 1986), cert. denied 485 U.S. 904 (1988). Moldovan involved an issue as to "whether an arbitration ruling to which a union was a party should have preclusive effect in an action to which pension fund trustees were a party." 913 F.Supp. at 384. Moldovan says that the party against which issue preclusion was asserted has to have "some fair relationship" with the prior litigation. 790 F.2d at 899. The focus is on the relationship between the parties and whether there is "such an identity of interests between the first and second party that the second should ever be deemed in privity with the first." Id. In Moldovan whether the necessary relationship with the prior litigation existed depended on what obligation the union had to safeguard the interests of the pension trustees. See also First Options of Chicago, Inc. v. Kaplan, 913 F. Supp. 377 (E.D. Pa. 1996).

In First Options the Federal District Court for the Eastern District of Pennsylvania ruled on a motion for summary judgment on the issue of res judicata in a Chapter 11 that was

converted to a Chapter 7. The bankruptcy was filed by only one spouse. The creditor moving for summary judgment had an agreement with both spouses but the component documents of the agreement were somewhat different as to each spouse.

First Options filed an action in federal district court against the non-debtor spouse who, together with her debtor spouse, had previously agreed to remit their income tax refund to First Options in partial satisfaction of a workout agreement. The workout involved debts owed when a business entity, wholly owned by only one spouse, failed. The bankruptcy court found in favor of First Options and against the debtor spouse on the issue of remission of the tax refund. When First Options separately sued the non-debtor spouse in federal district court asking for the tax refund, the non-debtor spouse counterclaimed against First Options. In argument on cross motions for summary judgment, First Options argued that the bankruptcy court's decision operated to preclude the non-debtor spouse from litigating the issue in federal district court, inter alia, because she was in privity with her spouse. The court decided that the non-debtor wife, who was sued under the same agreement, the obligations of which were discharged against her debtor-husband, was not in privity with her husband despite use of the same evidence and legal theories as those presented in the bankruptcy case against the husband-debtor. In two footnotes, First Options reviewed the concept of privity as it has issued from several decisions,

including Moldovan v. Great Atlantic & Pacific Tea Co., 790 F.2d 894 (3d Cir. 1986), *cert. denied,* 485 U.S. 904 (1988):

> *Moldovan* involved collateral estoppel, but discussed privity, a concept which is common to both preclusion doctrines, collateral estoppel (issue preclusion) and res judicata (claim preclusion)....

First Options, 913 F.Supp. at 384, n.9.

> Mrs. Kaplan argues that *Moldovan* suggests that virtual representation would apply "only where the prior party was legally obligated" to represent the interests of the nonparty's interests [sic] .... Indeed, some courts have agreed with this interpretation....
>
> The *Moldovan* opinion, while mentioning the nature of the obligation to represent the nonparty's interests, more strongly suggests that the focus should be on the identity of interests between the parties. The relationship between the parties and between the nonparty and the prior litigation, and the nature of the respective interests involved are all factors to consider in the privity analysis.

First Options, 913 F.Supp. at 384, n.10. Ms. Caracappa has not shown that Debtor was in privity with either TPC or his parents in the prior proceeding.

Debtor is a minority stockholder and vice president of TPC. In the equitable distribution proceeding, Debtor had no legal obligation to represent the interests of non-parties TPC or his parents, although it was to Debtor’s benefit to prove that he had incurred loans to TPC or to his parents that either could demand that he repay. Whether he won or lost that issue had no effect on either TPC or his parents in the equitable

distribution proceeding. He failed to convince Judge Sokolove that he owed the debts. Moreover, the July 30, 1998, claim of the parents did not exist at the time of trial before Judge Sokolove. Here, however, the burden is on the creditors to prove their claims against Debtor's estate. If they do so, they will share in a distribution to the extent funds are available to pay claims of their respective classes.

An appropriate order will be entered.

DATE: February 13, 2002

/s/
Judith K. Fitzgerald
United States Bankruptcy Judge

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA

IN RE:	
JOHN J. CARNEY	(Bankruptcy No. 98-19609DWS/JKF
Debtor	(Chapter 7
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	(
LINDA CARACAPPA	(
Movant	(Re: Objections to claims
v.	(
THOMAS P. CARNEY, INC.	(
Respondent	(
	(
**********	(
	(
LINDA CARACAPPA	(
Movant	(
v.	(
THOMAS P. CARNEY and	(
TERESA CARNEY	(
Respondents	(

ORDER

AND NOW, this **13th** day of **February**, **2002**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED, and DECREED** that the Motion for Summary Judgment filed by Linda Caracappa is **DENIED**.

It is **FURTHER ORDERED** that discovery is closed. A joint pretrial narrative, including pretrial stipulations of fact, brief descriptions of the witnesses to be called and their testimony, and copies of all documents to be used at trial, premarked for identification, shall be filed (with a copy to the undersigned at 5490 U.S. Steel Tower, 600 Grant Street, Pittsburgh, PA 15219) and served **on or before March 11, 2002**. A **telephonic** pretrial conference will be held on **March 22, 2002,** at **1:00 p.m**. Counsel to Trustee shall place the calls.

A trial date will be announced at the pretrial conference.

/s/
Judith K. Fitzgerald
United States Bankruptcy Judge

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